

**Diversified Case Company, Inc. and Local 345, International Ladies' Garment Workers' Union.**  
Case 3-CA-10230

August 31, 1982

**DECISION AND ORDER**

BY CHAIRMAN VAN DE WATER AND  
MEMBERS FANNING AND HUNTER

On March 3, 1982, and April 2, 1982, Administrative Law Judge Joel A. Harmatz issued the attached Decision and Supplemental Amended Decision, respectively, in this proceeding. Thereafter, the General Counsel, the Charging Party, and Respondent filed exceptions and supporting briefs, and the Charging Party filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decisions in light of the exceptions and briefs and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions of the Administrative Law Judge as modified herein and to adopt his recommended Order, as modified herein.

The Administrative Law Judge concluded that Respondent violated Section 8(a)(1) of the Act by terminating employees William and Robert Fowler because they engaged in activities protected by Section 7 of the Act. We agree with this conclusion and the rationale therefor as set forth in the Administrative Law Judge's Decision and Supplemental Amended Decision. We disagree, however, with the Administrative Law Judge's further conclusion that Respondent did not further violate the Act by terminating employee Mark Lamb for engaging in protected activities.

Respondent employed six employees in the "woodshop" of its customized packing plant.<sup>2</sup> Their immediate supervisor was Catlin. Three of these employees were the alleged discriminatees—brothers Robert and William Fowler and Mark Lamb. The Fowlers and Lamb were allegedly terminated on December 12, 1980.

Prior to December 12, 1980, all of the employees in the woodshop had complained to Catlin about the cold conditions in the woodshop and the

amounts of their paychecks.<sup>3</sup> About a week before the terminations, Bill Fowler circulated a petition protesting the pay system.

On December 12, the extreme cold in the woodshop was unabated. The employees complained to Catlin and threatened to go home if the work area did not warm up by noon. Additionally, Friday, December 12, was payday. When the Fowler brothers received their checks they felt that they had been shortchanged. Two other employees, Usyk and Hall, also complained that they had been unjustifiably charged with "make-up."

Prior to lunch, some of the employees including Lamb and the Fowlers told Catlin that because of the cold and the errors in their paychecks they would be going home. The Fowlers said they would return the next day for the Saturday overtime for which they had been scheduled. Catlin warned the employees that if they did not return from lunch they would probably be discharged.

At noon, all the workshop employees punched out for lunch. They cashed their checks and discussed their complaints concerning Respondent. The Fowlers and Lamb decided not to return to work after lunch. At some time on December 12, "employee status reports" were completed on the Fowlers and Lamb. The reports each said: "12/12/80 walked out 12:00 didn't like make-up on payck. (assumed quit)."

The next day, Saturday, the Fowlers reported for work at 7 a.m. Their timecards along with Lamb's timecard were missing from the rack. The Fowlers confronted Catlin who indicated that he "guessed" they were "fired." Subsequently, Denison, the plant manager, told the Fowlers that they were fired and asked, "[H]aven't we been good enough to you people?" William Fowler showed Denison his paycheck and said, "I . . . guess not. If you don't even make minimum wage in America, something's gotta [sic] be wrong." Then the Fowlers left. On their way home, the Fowlers stopped at Lamb's house and told him that his timecard was not in its slot and that Catlin had told the Fowlers that all three employees had been fired.<sup>4</sup>

As noted, the Administrative Law Judge correctly concluded that Respondent unlawfully discharged the Fowlers for engaging in protected concerted activity. While the Administrative Law

<sup>1</sup> Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

<sup>2</sup> At the time of these events the employees were unrepresented.

<sup>3</sup> Respondent's employees received the minimum wage, unless they exceeded Respondent's production standards, in which case they earned "incentive pay." If they produced below Respondent's standards, they were charged make-up which reduced, concomitantly, future incentive pay. The employees claimed that they were wrongly being charged with make-up.

<sup>4</sup> Neither Catlin nor Lamb testified at the hearing. Lamb was serving in the United States Armed Forces in Korea at the time of the hearing.

Judge found that Respondent unlawfully discharged the Fowlers, however, he concluded that, although Respondent conducted itself in an identical fashion with regard to all three alleged discriminatees, Lamb was not unlawfully discharged. The Administrative Law Judge distinguished Lamb's situation because, while the Fowlers showed their intent to return to Respondent's employment by reporting for work on Saturday, there is no evidence that Lamb ever attempted to return to work. The Administrative Law Judge concluded that, since the record did not affirmatively establish whether, in failing to return to work on the afternoon of December 12, 1980, Lamb intended to engage in a protected walkout or to sever permanently his employment relationship with Respondent, Respondent could not be found to have unlawfully discharged him.

We note at the outset that the record establishes that Lamb was among those who protested Respondent's pay practices and the cold in the woodshop and among those who told Supervisor Catlin that they would go home Friday afternoon if the woodshop did not become warmer. Concededly, as the Administrative Law Judge stated, Robert Fowler testified that, although Mark Lamb was present when the employees told Catlin they would be going home Friday afternoon because of the cold and the asserted paycheck problem, he was "off to the side." The Administrative Law Judge felt that this remark by Fowler cast some doubt on Lamb's intentions in leaving work that day. However, this remark only implies, at best, that Lamb was not a leading spokesman for the group since Robert Fowler also testified that Lamb, in concert with the Fowlers and another employee, Usyk,<sup>5</sup> told Catlin that he was going home because of the cold and the paychecks. Indeed, Respondent stipulated that the conduct engaged in by the employees on the afternoon of Friday, December 12, "was concerted." Thus, we can find nothing in the record that would prompt the suspicion that Lamb's intentions were any different from those of the Fowlers.

Nor did Respondent treat Lamb any differently from the other employees who walked out. Thus, Respondent also stipulated that "the events of December 12th, caused the termination, the end of employment of the three individuals involved." Additionally, Respondent stipulated that Catlin told the employees who did not walk out on Friday afternoon that the three employees who did, the Fowlers and Lamb, "would probably be fired. If they didn't come back in after lunch [sic]."

<sup>5</sup> At lunchtime, Usyk decided to go back to work that afternoon because he was afraid of being fired.

Sometime on Friday Respondent made identical notations on status reports for all three employees. Further, the timecards of all three employees had been pulled by the time the Fowlers arrived for work at 7 a.m. on Saturday, December 13.

Respondent concedes in its brief to the Board that, when the Fowlers reported to work on December 13, "the Company had *already* treated their positions as terminated . . . ." (Emphasis supplied, see "Exceptions for Respondent Diversified Case Company," p. 26). It is clear then that Respondent intended to fire all three employees, and had done so before work commenced on Saturday. Thus, having terminated all three employees in the same fashion, Respondent cannot now argue that Lamb was not terminated because, although he admittedly acted in concert with the Fowlers, he did not separately and explicitly state his intentions when he walked out.

It may be argued that the lack of evidence in the record of any attempt by Lamb to report for work is probative of his lack of intention, when he left on Friday, of ever returning. However, this would be an unreasonable assumption. Again, we note that when the Fowlers arrived on Saturday they saw their timecards were missing and were told they were fired. Lamb had engaged in the same conduct and his card was also missing. Naturally, as Respondent should have anticipated, the Fowlers reported to Lamb, who lived in the same village that they did, that he had been fired. Under the circumstances Lamb could reasonably have assumed that his return to work on the next day he was scheduled to work would have been a futile act, particularly since Catlin had predicted that the employees would be fired if they walked out. Nor would Lamb's return to work on Monday<sup>6</sup> have altered what Respondent had already accomplished by Saturday morning.<sup>7</sup>

In view of all the foregoing, we find that Mark Lamb was unlawfully discharged by Respondent because he engaged in activities protected under Section 7 of the National Labor Relations Act. Accordingly, we conclude that Respondent committed an additional violation of Section 8(a)(1) of the

<sup>6</sup> There is no evidence that Lamb was scheduled to perform overtime work on Saturday.

<sup>7</sup> There is no indication that Respondent might have had a change of heart by the following Monday. In fact, the opposite appears to be the case for Respondent argued in the hearing and in its post-hearing brief to the Administrative Law Judge that it "properly exercised its reserved managerial right to defend against unprotected employee activity by treating the employment of the alleged discriminatees as terminated by reason of their decision to participate in an illegal, intermittent work stoppage." Respondent made no distinction between the Fowlers and Lamb.

Act by discharging Lamb, and we shall modify the recommended Order accordingly.<sup>8</sup>

### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Diversified Case Company, Inc., Whitesboro, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(a):

"(a) Offer Robert Fowler and William Fowler immediate reinstatement to their former positions or, if not available, to substantially equivalent positions, without loss of seniority or other benefits and privileges, and make them whole for any earnings lost by reason of the discrimination against them in the manner set forth in the section of this Decision entitled 'The Remedy.' In addition, with respect to Mark Lamb, Respondent shall notify Lamb by registered letter addressed to his last known address that the Respondent will afford him an opportunity to apply for reinstatement within 90 days after his discharge from the Armed Forces, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered because of Respondent's discrimination against him by payment to him of a sum of money equal to the amount he would normally have earned as wages between the date of his discharge and the date when he entered the Armed Forces, and between a date 5 days after his timely application for reinstatement and the date of the offer of reinstatement by Respondent, less his net earnings during these periods. Respondent is ordered to pay Mark Lamb immediately that portion of his net backpay accumulated between the date of his discriminatory discharge and the date he en-

<sup>8</sup> We do not award backpay to the three employees involved for Friday, December 12, 1980, since they voluntarily absented themselves from work. We award backpay to the Fowlers beginning Saturday, December 13, 1980, when they were discharged, and for Lamb beginning on Monday, December 15, 1980. On these circumstances we agree that it would have been futile for Lamb to attempt to return to work.

We shall order that Respondent notify Lamb of his right to apply for reinstatement within 90 days after his discharge from the Armed Forces and that he be awarded backpay from the date of his discharge until the date he was inducted into the Armed Forces and from a date 5 days after he applies for reinstatement on his return from the service until the date of Respondent's offer of reinstatement. Respondent shall also be ordered to pay Lamb immediately that portion of his net backpay accumulated between the date of his discriminatory discharge and the date he entered the Armed Forces, without awaiting a final determination of the full amount of his award. See, e.g., *Modern Motor Express, Inc.*, 129 NLRB 1433 (1961), and *Alamo Express, Inc.*, and *Alamo Cartage Company*, 127 NLRB 1204 (1960).

tered into the Armed Forces, without awaiting a final determination of the full amount of the award.

2. Substitute the attached notice for that of the Administrative Law Judge.

### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

- To engage in self-organization
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
- To refrain from the exercise of any or all such activities.

Accordingly, we give you these assurances:

WE WILL NOT discourage employees from engaging in activity protected by Section 7 of the National Labor Relations Act by discharging them or in any other manner discriminating against them with respect to their wages, hours, or tenure of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights set forth above.

WE WILL immediately offer reinstatement to Robert Fowler and William Fowler to their former positions or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings they may have sustained by reason of our discrimination against them, with interest.

WE WILL also make whole Mark Lamb for any loss of earnings he may have suffered by reason of our discrimination against him, plus interest, and we shall notify him of his right to apply for reinstatement within 90 days after his discharge from the Armed Forces.

DIVERSIFIED CASE COMPANY, INC.

## DECISION

## STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge: This proceeding was heard in Utica, New York, on December 3, 1981, upon an original unfair labor practice charge filed on January 29, 1981, and a complaint which issued on March 4, 1981. Said complaint alleged that Respondent violated Section 8(a)(1) of the Act by, on December 13, 1980, terminating, and thereafter refusing to reinstate, employees William "Bill" Fowler, Robert "Alf" Fowler, and Mark Lamb because they engaged in activity protected by the Act. In its duly filed answer, Respondent denied that any unfair labor practices were committed. Thereafter, briefs were filed on behalf of the General Counsel and the Charging Party.

Upon the entire record in this proceeding, including my direct, personal observation of the witnesses while testifying as well as their demeanor, and upon consideration of the post-hearing briefs, I hereby find as follows:

## FINDINGS OF FACT

## I. JURISDICTION

Diversified Case Company, Inc., herein called Respondent, is a New York corporation, with a place of business in Whitesboro, New York, from which it is engaged in the manufacture, distribution, and sale of customized packing cases and related products. During the 12-month period preceding issuance of the complaint, a representative period, Respondent, in the course of said operations, purchased goods, materials, and services valued in excess of \$50,000, which were shipped directly from States of the United States other than the State of New York.

The complaint alleges, Respondent at the hearing admitted, and I find that Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

## II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, Respondent at the hearing admitted, and it is found that Local 345, International Ladies' Garment Workers' Union, herein called the Union, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

## III. THE ALLEGED UNFAIR LABOR PRACTICES

This case raises the question of whether Respondent violated Section 8(a)(1) through its alleged termination of three employees following their quitting of work in connection with what they and other employees perceived to be adverse working conditions. See, e.g., *N.L.R.B. v. Washington Aluminum Co., Inc.*, 370 U.S. 9 (1962).

Respondent is engaged in the manufacture of customized packaging cases. At the time of the events here in controversy, its employees were not represented by a labor organization. The alleged discriminatees, Robert Fowler, William Fowler, and Mark Lamb, were among

the six employees assigned to Respondent's woodshop. Don Catlin was their immediate supervisor.

The last day worked by the alleged discriminatees was Friday, December 12, 1980.<sup>1</sup> Prior thereto, woodshop employees had complained to Catlin concerning the amount of their paychecks and Respondent's method of compensation. Indeed, about a week before the terminations, a petition was prepared and circulated by Bill Fowler protesting Respondent's incentive system. After the document was signed by all woodshop employees, Fowler placed it in the "suggestion box" made available to employees by Respondent. It also appears that the week preceding December 12 was cold and a lack of adequate heat in their work area provoked all six woodshop employees to register complaints with Catlin concerning the low temperatures during that period.

It does not appear from the credible proof that, by December 12, the cold conditions in the woodshop had abated. According to credited testimony, that morning, frost was evident on the machines, glue would not stick to the boxes, and employees wore gloves, coats, hats, and boots.<sup>2</sup> Those assigned to the woodshop again complained to Catlin about the cold, threatening to go home if their work area did not warm up by noon. Catlin responded by indicating that management was concerned and had considered the possibility that employees might be allowed to go home at noon because of the lack of heat. He urged them to bear with the situation because a representative of a customer, the Kodak Company, was to visit the plant that day.<sup>3</sup>

December 12 was also payday. At 11 a.m., Catlin distributed the paychecks. The Fowlers felt that their paychecks were discrepant. Thus, Robert Fowler testified that he was wrongly charged with \$40 makeup.<sup>4</sup> Bill Fowler, upon receiving his check, concluded that it was short, and that his earnings for the week were less than the minimum wage.<sup>5</sup>

Before lunch, the Fowlers informed Catlin that, because of the cold and the errors in their checks, they would go home for the afternoon and return the next day. Catlin warned that, if they did not return from lunch, they would probably be discharged. At noon, all

<sup>1</sup> Unless otherwise indicated, all dates refer to 1980.

<sup>2</sup> Respondent's president, John J. Fitzsimmons, Sr., testified that he would have passed through the woodshop on three occasions on December 12. It was the sense of his testimony that employees in that department were not so cold as their testimony herein suggests. In the circumstances, I am inclined to believe the testimony of Robert and William Fowler, as corroborated by Robert Hall, an incumbent employee at the time of the hearing. The testimony of the latter is logically consistent with other undenied testimony and was preferred over the vagaries related by Fitzsimmons.

<sup>3</sup> Catlin was not called to refute the General Counsel's evidence in this regard. I credit the latter.

<sup>4</sup> Respondent's employees are compensated on an incentive basis. They earn at the Federal minimum wage if they do not exceed relevant production standards. And when producing at levels below such standards, they are charged with makeup. According to the credited testimony of the Fowlers, makeup prejudices the employee's future opportunities to earn incentive pay, for future incentive earnings would be reduced by past makeup charges. This interpretation is not refuted by Respondent's evidence, be it parole testimony or documentation. (See Resp. Exh. 1.)

<sup>5</sup> According to the testimony of Bob Fowler, woodshop employee Andy Usyk and Bob Hall also complained that their checks held them accountable for unjustified makeup.

woodshop employees punched out to go to lunch. They cashed their checks and discussed the matter. The Fowlers and Mark Lamb decided not to return after lunch. At no time thereafter did either of the three work for Respondent. It is significant that at some time on December 12 "employee status reports" were completed on Robert Fowler, William Fowler, and Mark Lamb. Each bore the following notation: "12/12/80 walked out 12:00 didn't like make-up on payck. (Assumed quit)."

On Saturday, December 13, Bill and Bob Fowler reported for work at 7 a.m.<sup>6</sup> Their timecards were not in the rack. Ultimately, they reported to their work area, where they confronted Catlin who indicated that he "guessed" that the Fowlers had been "fired." At this point, Plant Manager Gordon Dennison appeared. Bill Fowler addressed Dennison concerning the amount of his check whereupon the latter inquired as to whether the Company had not been "good enough" to him. Fowler replied, "I guess not . . . if you can't even make minimum wage in America something's got to be wrong." Dennison then told the men, "you're fired get your stuff and go."

Based on the foregoing, it is clear beyond peradventure that Respondent on December 13, on direction of Plant Manager Dennison, precluded the Fowlers from returning to their jobs solely because they participated in a half day strike in protest of Respondent's wage and pay practices and cold conditions in their work area.<sup>7</sup> Consistent with the positions advanced by the General Counsel and the Charging Party, well-established statutory policy confirms *prima facie* that Respondent thereby violated Section 8(a)(1).<sup>8</sup> As there is no showing on behalf of Respondent that the Fowlers were permanently replaced prior to their December 13 offer to return to work, or that they manifested disloyalty or other conduct transcending the protective ambit of Section 7, the violations alleged have been substantiated as to the Fowlers. I so find.

Entirely different considerations come into play in the case of Mark Lamb. Lamb did not appear as a witness. According to representation made by counsel for the General Counsel, Lamb, sometime after December 12, enlisted in the U.S. Army and at the time of the hearing was on active duty in Korea. In his case there is no direct proof that he, like the Fowlers, possessed an intention of ever returning to work after December 12. In other words, there is no direct primary evidence of a probative nature that Lamb left work on December 12 to participate in temporary protest as distinguished from a privately held desire to permanently sever his employment relationship with Respondent. Thus, Lamb did not report to work on December 13, and, insofar as this record discloses, had no further communication with Respondent. It is true that an employer may becloud a

striker's obligation to offer to return to work by creating an aura of futility through the discharge of other similarly situated strikers. Here, however, the defect in the General Counsel's case is more fundamental. For the question presented is whether Lamb was situated similarly to the strikers as having in fact engaged in any activity protected by Section 7, a matter which must be answered affirmatively if the initial burden of the General Counsel is deemed to be satisfied. As the record now stands, one might only *speculate* that Lamb ever intended to return to work, a fact which only Lamb himself could clarify. Although it might be said that ambiguities ought be resolved against the perpetrator of unfair labor practices, here the existence of such unlawful conduct is reduced to the conjectural by the absence of clear evidence. Indeed, the need for caution is signaled by the suggestion in Robert Fowler's testimony that Lamb may have been less involved with the Fowlers than aspects of the General Counsel's secondary evidence implies. Thus, cross-examination of Fowler, as to the final conversation with Catlin on December 12, produced the following colloquy:

MR. POLLACK: Where was Mark Lamb?

MR. R. FOWLER: He was there, but he was off to the side.

MR. POLLACK: When you say he was there, was he part of the conversation?

MR. R. FOWLER: Well Mark, if you knew him, it's hard to say. He could be and couldn't be sometimes.

On balance the very adversities that might provoke a protected walkout might also provide the impetus for an employee's decision to permanently sever his employment relationship. Yet, participation in the former falls within, while the latter is totally alien to the remedial province of the Board. The General Counsel has failed to reconcile Lamb's status in this regard, and, accordingly, I shall dismiss the allegation that Respondent violated Section 8(a)(1) in his case.

#### CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) of the Act by, on December 13, 1980, terminating its employees William Fowler and Robert Fowler because they engaged in activity protected by Section 7 of the Act.
4. Respondent did not violate Section 8(a)(1) of the Act in the treatment accorded Mark Lamb.
5. The unfair labor practices set forth in paragraph 3 above are unfair labor practices having an affect upon commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, it shall be recommended that it

<sup>6</sup> Mike Lamb did not report for work that day. The record does not indicate why.

<sup>7</sup> As shall be seen, the evidence as to the intention of Mark Lamb concerning the walkout is less than clear. William Fowler testified that a part of his reason for walking out was the discharge of coworker, Pete Goodman. This was not shown to be among the reasons communicated to management, however.

<sup>8</sup> See *N.L.R.B. v. Washington Aluminum Co.*, *supra*; *Go-Lightly Footwear, Inc.*, 251 NLRB 42, 44-45 (1980).

cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act.

Having unlawfully terminated the employment of Robert and William Fowler on December 13, 1980, it shall be recommended that Respondent offer them immediate reinstatement to their former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to their seniority or other rights and privileges, and make them whole for earnings lost by reason of the discrimination against them by payment of a sum of money equal to that which they normally would have earned from December 13, 1980, to the date of a valid offer of reinstatement, less net interim earnings during that period. Backpay shall be computed on a quarterly basis in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).<sup>9</sup>

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

#### ORDER<sup>10</sup>

The Respondent, Diversified Case Company, Inc., Whitesboro, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging employees from engaging in activity protected by Section 7 of the Act by discharging, or in any other manner discriminating against, employees with respect to their wages, hours, or tenure of employment.

(b) In any like or related manner interfering with, coercing, or restraining employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the purposes of the Act:

(a) Offer Robert Fowler and William Fowler immediate reinstatement to their former positions or, if not available, to substantially equivalent positions, without loss of seniority or other benefits and privileges, and make them whole for any earnings lost by reason of the discrimination against them in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze and determine the amount of backpay due under the terms of this Order.

(c) Post at its facility in Whitesboro, New York, copies of the attached notice marked "Appendix."<sup>11</sup> Copies of

<sup>9</sup> See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

<sup>10</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

<sup>11</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

said notice, on forms provided by the Regional Director for Region 3, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

#### SUPPLEMENTAL AMENDED DECISION

JOEL A. HARMATZ, Administrative Law Judge: On March 3, 1982, I issued a Decision in the above-entitled proceeding. Prior thereto, Respondent, on a timely basis, filed a post-hearing brief which, through apparent inadvertence, was neither docketed in the Division of Judges nor received for consideration. Thereafter, by Order of the National Labor Relations Board dated March 19, 1982, said proceeding was remanded to me for the purpose of giving consideration to Respondent [sic] brief, and for reconsideration of my Decision in view of said brief." Accordingly, pursuant to the remand and the entire record in this proceeding, the Decision heretofore issued on March 3, 1982, has been reconsidered in the light of Respondent's post-hearing brief, and is amended in the following particulars:

1. Delete footnote 2, and renumber the following footnotes consecutively.

2. Insert the following as an addition to the newly designated footnote 6.

Respondent contends that the assertion by the alleged discriminatees that cold conditions contributed to the walkout was lacking in rational foundation and pretextual. This contention must be weighed in the light of the declaration by the Supreme Court that "the reasonableness of workers' decisions to engage in concerted activity is irrelevant. . . ." *N.L.R.B. v. Washington Aluminum Corp.*, 370 U.S. 9, 16. In any event, clear testimony adduced in support of the complaint established that woodshop employees on the day of and preceding the walkout repeatedly complained of the cold to their foreman. Yet, Respondent, for reasons undisclosed on the record, declined to call Foreman Donald Catlin. Instead, Respondent elected to proceed on the basis of a less direct line of proof. Thus, Respondent points to a temperature chart prepared on December 15, which shows that it was 60 degrees in the woodshop area that day. Respondent next points to testimony of its president, John J. Fitzsimmons, Sr., that he had no knowledge of any repairs made between December 12 and 15 and maintenance man Joseph Zylas' work records which do not reflect that he made repairs during that period. From this I am asked to spurn all other possibilities, to reject the direct evidence offered by the General Counsel, and to deduce that on December 12 temperatures in the woodshop could not have fallen below comfortable levels. I decline. Zylas, who prepared said documents, impressed me as an unreliable witness, who lacked independent recollection as to just what he did between December 12 and 15. Furthermore, his testimony as to what should have gone into his personal work records during that period lacked certainty. The clear, uncontradicted testimony of the Fowlers as corroborated by Robert Hall, an incumbent employee at the time of the hearing, was far more convincing. The General Counsel's evidence is also preferred over the implication in further assertions by Fitzsimmons that he would have passed through the woodshop on three occasions on December 12 and that conditions in that department were not so cold as employees herein suggest.

3. Delete the sentence in section III, paragraph 9, which reads:

Consistent with the positions advanced by the General Counsel and the Charging Party, well-established statutory policy confirms *prima facie* that Respondent thereby violated Section 8(a)(1).

Substitute therefor the following:

Respondent contends that said action was legitimate, inasmuch as the form of protest utilized by the alleged discriminatees exceeded the protective mantle of the Act. In this respect, Respondent first asserts that the walkout occurred under conditions placing it on parity with the unannounced, repeated, or intermittent work stoppages deemed unprotected by established statutory precedent. See, e.g., *International Union, U.A.W.A., A.F. of L., Local 232, et al. v. Wisconsin Employment Relations Board, et al.*, 336 U.S. 245 (1949); *Pacific Telephone and Telegraph Co.*, 107 NLRB 1547.

Contrary to the cited authority, however, the conduct involved here was limited to a single spontaneous act against a background of unredressed employee complaints concerning both climatic conditions in the work place and the method of compensation. As such, it more closely resembled that which is protected on authority of *N.L.R.B. v. Washington Aluminum Company, Inc.*, 370 U.S. 9 (1962), than unannounced stoppages conducted over a period of time with a sporadic, hit-and-run character. Nevertheless, the fact that the stoppage took place only once and was not an extension of any prior employee action does not end the inquiry for, as I understand the precedent, participants in a single stoppage may be fair game for legitimate discipline where the evidence demonstrates that "... they joined with knowledge of its planned intermittent and hit-and-run aspects." 107 NLRB at 1550. See also, *John S. Swift Company, Inc.*, 124 NLRB 394, 396-397 (1959). With this in mind, Respondent observes that the dischargees walked out announcing that they would return to work the next day and did so without notifying Respondent of any conditions that would have to be met in order for them to end their protest. From this it is argued that "... the alleged discriminatees were engaging in an intermittent action program which was not geared toward curing the ills allegedly present and thereby transgressed the bounds of a genuine strike." There is no merit in this view.

Pursuant to the Board's holding in *Polytech, Incorporated*, 195 NLRB 695, 696 (1972), a single spontaneous walkout is presumptively protected strike activity and "... such presumption should be deemed rebutted when and only when the evidence demonstrates that the stoppage is part of a plan or pattern of intermittent action which is inconsistent with a genuine strike or genuine performance by employees of the work normally expected of them by the employer. "Contrary to Respondent, that burden is not met by the fact that participants in the

instant strike agreed to return to work the next day without imposing conditions." Such an inference was rejected by the Board in *Polytech, Incorporated, supra*, on grounds that, as here, the record includes no "... conclusive evidence one way or the other as to what the men would do in the future absent any change in the conditions which prompted their walkout." 195 NLRB at 696. Thus, as there had been no prior stoppage, the intent of the strikers as to the future remained undeclared, hence the presumption that the walkout was protected prevailed. See *Union Electric Company*, 219 NLRB 1081, 1082 (1975). Nor is it of consequence that the dischargees left work without reciting the conditions that the employer would have to meet in order for them to return to work. To hold otherwise is to resurrect the view of the lower court rejected by the Supreme Court in *N.L.R.B. v. Washington Aluminum Co., supra*. In this regard, the Court stated:

We cannot agree that employees necessarily lose their right to engage in concerted activities under § 7 merely because they do not present a specific demand upon their employer to remedy a condition they find objectionable. [370 U.S. at 14.]

It would seem to follow that, if employees need not recite a demand, they need not define the conditions that would have to be met prior to their return to work. In any event, at 370 U.S. 14, the Court went on to caution against imposing technical requirements so as to thwart the rights guaranteed to unsophisticated employees stating as follows:

To compel the Board to interpret and apply ... language in the restricted fashion ... would only tend to frustrate the policy of the Act to protect the right of workers to act together to better their working conditions. Indeed, as indicated by this very case, such an interpretation of § 7 might place burdens upon employees so great that it would effectively nullify the right to engage in concerted activities which that section protects. The ... employees here were part of a small group of employees who were wholly unorganized. They had no bargaining representative and, in fact, no representative of any kind to present their grievances to their employer. Under these circumstances, they had to speak for themselves as best they could.

4. Delete the newly designated footnote 7.

5. Add the following as a new footnote 7; immediately after "as to the Fowlers," at the end of paragraph 9:

<sup>7</sup> Even assuming that Respondent maintained a firmly embedded, published procedure for processing of employee wage complaints, neither incidence thereof nor a plant rule forbidding employees from leaving the plant without permission would serve to diminish the right of employees to withhold their labor where in their judgment the established process has failed to serve their interest. As stated by the Supreme Court at 370 U.S. 16-17:

Nor can we accept the company's contention that because it admittedly had an established plant rule which forbade employees to leave their work without permission of the foreman, there was justifiable "cause" for discharging these employees, wholly separate and apart from any concerted activities in which they engaged in protest against the poorly heated plant. Section 10(c) of the Act does authorize an employer to discharge employees for "cause" and our cases have long recognized this right on the part of an employer. But this, of course, cannot mean that an employer is at liberty to punish a man by discharging him for engaging in concerted activities which § 7 of the Act protects. And the plant rule in question here purports to permit the company to do just that for it would prohibit even the most plainly protected kinds of concerted work

stoppages until and unless the permission of the company's foreman was obtained.

Even if not reduced to the immaterial by the above, the so-called policy or practice concerning pay complaints was unwritten, not formally published, and was described by Fitzsimmons, himself, as dependent more upon what employees choose to do than upon any consistent or required course they must follow.

Accordingly, subject to the foregoing modifications, and after full consideration of Respondent's post-hearing brief, the findings, resolutions, conclusions, and recommendations contained in the Decision issued by me on March 3, 1982, are hereby affirmed.